

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY ALAN LIKENS,

Defendant-Appellant.

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UNPUBLISHED

January 10, 2008

No. 274710

Genesee Circuit Court

LC No. 05-016975-FC

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Our Supreme Court has remanded this case for consideration as on leave granted. Defendant challenges his sentences of 12 to 40 years and 12 to 30 years imposed on his plea-based convictions of first-degree home invasion, MCL 750.110a(2), and armed robbery, MCL 750.529, respectively. We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant entered a plea agreement with the prosecutor to plead guilty to first-degree home invasion and armed robbery and having two prior felony convictions, MCL 769.11, in exchange for the prosecution's agreement to forego bringing other related charges. In addition, the prosecutor agreed not to oppose defendant's seeking a sentence agreement with the trial court.

On January 3, 2006, the day before the plea hearing and before the parties had reached agreement, they appeared in open court on the record. Although the prosecutor indicated a plea agreement had not been reached and defendant indicated he wanted a trial, defense counsel and the trial court discussed a possible sentence agreement. The transcript indicates the prosecutor, defense counsel, and the trial court had discussed off the record the court's inclination as to an appropriate sentence. On the record, defense counsel noted that he and the prosecutor had preliminarily scored the guidelines, arriving at a recommended minimum sentence range for both offenses of from 11 ½ or 12 years to 23 years. Counsel noted that the trial court had said it would sentence defendant "to the bottom of the guidelines, that being somewhere around the eleven and-a-half/twelve years - - that you would go to the bottom of the guidelines if [defendant] would plead to everything." The trial court confirmed the discussion by noting it would also impose concurrent sentences for the two charged offenses that would be consecutive to defendant's existing sentence for which he was on parole.

The next day when the parties appeared in court for trial, the prosecutor announced a plea agreement had been reached. The prosecutor stated that under the agreement defendant would plead guilty to all charged offenses and would acknowledge being a habitual offender while the prosecutor would not charge defendant with related uttering and publishing offenses. The prosecutor also stated defendant would “seek a *Killibrew* sentence” with the trial court.<sup>1</sup> Defense counsel acknowledged the plea agreement as stated by the prosecutor and placed on the record the *Killibrew* agreement with the court. Specifically, defense counsel stated that defendant would be sentenced at the low end of the guidelines, and that the sentences would run concurrently. Defense counsel noted that the low end of the guidelines provided for a minimum sentence in the range of eleven and one-half years.<sup>2</sup> Defense counsel further noted that if the actual guidelines at sentencing were higher or lower than estimated, “We’ll go back to the Court and discuss all of this.” The trial court explained to defendant that at the time of sentencing, “if I cannot agree to sentence you at the bottom end of the guidelines, then I will tell you what sentence I would impose and would give you the opportunity to either choose to go forward with the sentence or to allow you to withdraw your plea and go to trial.” Defendant affirmed he understood. After complying with the court rules, the trial court accepted defendant’s plea.

At the sentencing proceeding, neither defense counsel nor the prosecutor objected to the content of the Presentence Investigation Report (PSIR), which indicated that the guidelines recommended a minimum sentence ranges for the two offenses of 72 to 180 months for first-degree home invasion and 81 to 202 months for the offense of armed robbery. Defense counsel reminded the court of the sentence agreement, noting that he and the prosecutor had originally calculated the guidelines at approximately 11 or 12 years. Counsel first stated that the guidelines “came in a little higher,” and then stated that the guidelines were “even lower” than originally calculated. Defense counsel urged the court to “stay within the guidelines and stay within the [sentence] agreement.” The trial court stated that it would honor the sentencing agreement and sentenced defendant to concurrent terms of 12 to 40 years for first-degree home invasion, and 12 to 30 years for armed robbery. These sentences were to run consecutively to the sentence defendant was serving on parole at the time he committed the instant offenses.

Defendant subsequently moved for specific performance of the sentence agreement, or, in the alternative, to withdraw his plea. Defendant emphasized that the sentence agreement provided that he would be sentenced at the bottom of the guidelines. Defendant’s minimum

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<sup>1</sup> In *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982), our Supreme Court held that a trial court may not initiate or participate in discussions regarding a plea agreement. *Id.* at 205. In *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), our Supreme Court modified *Killebrew* to allow the trial court, at the request of a party, to state on the record the length of the sentence that appeared to be appropriate, based on the information available to the trial court at the time. *Id.* at 283. The *Cobbs* Court made it clear that the trial court’s preliminary evaluation did not bind the court’s ultimate sentencing discretion.

<sup>2</sup> In the original transcript of the January 4, 2006 proceedings, defense counsel stated, “seven and one-half years.” This Court granted the prosecutor’s motion to remand to correct the record. Unpublished order of the Court of Appeals issued March 9, 2007 (Docket No. 274719).

sentences of 144 months exceeded the bottom of guidelines recommended range for the offense of first-degree home invasion by 72 months and exceeded the bottom of the guidelines recommended range for the offense of armed robbery by 63 months. Thus, defendant asserted that his sentences for each offense did not comport with the sentence agreement.

The trial court denied defendant's motion. The court reviewed the transcript of the sentencing proceeding wherein both defense counsel and the prosecutor discussed their belief at the time of the plea that the lower end of the guidelines range would be in the range of 11 to 12 years. The trial court determined that based on the discussion of counsel and the court at the sentencing proceeding, "the Court was sentencing [defendant] within what everyone understood the agreement to be." Consequently, the trial court denied the motion.

Underlying factual findings of the trial court at sentencing are reviewed for clear error while questions of law are reviewed de novo. MCR 2.613(C); *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). We review de novo as a question of law whether defendant has a right to withdraw his guilty pleas under the facts and circumstances of this case.

We can find no clear error in the trial court's determination that at the time of sentencing both counsel and the court believed the sentences imposed were within the sentence agreement placed on the record when defendant entered his guilty pleas. Nevertheless, at the plea proceeding defense counsel stated that if the sentence guidelines turned out to be higher or lower than the parties estimated, "we'll go back to the Court and discuss all of this." This clearly implied that if the actual guidelines were different than expected by the parties, as turned out to be the case, plea negotiations would return to the status quo ante. Moreover, the trial court explicitly told defendant before he entered his guilty pleas that if at the time of sentencing, "I cannot agree to sentence you at the bottom end of the guidelines, then I will tell you what sentence I would impose and would give you the opportunity to either choose to go forward with the sentence or to allow you to withdraw your plea and go to trial." Thus, defendant could only have understood he would have a right to withdraw his guilty pleas if the trial court determined it could not impose a minimum sentence at the bottom of the guidelines range.

In *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), our Supreme Court held that "a defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation."

We remand this case for resentencing on both convictions with instructions that if the trial court determines that it cannot impose minimum terms at the bottom of the guidelines ranges of 72 to 180 months for first-degree home invasion and 81 to 202 months for armed robbery, defendant must be given the opportunity to withdraw his guilty pleas. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski